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Nos. 80-847 and 80-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, ET AL., *Appellants,*

v.

HARRISON SCHMITT, ET AL., *Appellees.*

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Columbia

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge court of the United States District Court for the District of Columbia correctly concluded, on the basis of this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that a provision of the Presidential Election Campaign Fund Act imposing a $1,000 ceiling on independent expenditures which further the election of the presidential candidate by political committees other than a candidate's authorized committee, violates the First Amendment guarantees of freedom of speech and association.*

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* In addition to the parties named in the caption, the other parties to the proceeding below were Americans for an Effective Presidency, on whose behalf this Motion to Dismiss or Affirm is submitted, David Cohen, Winifred Long, Carl T. Curtis, and Fund for a Conservative Majority.

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On Appeal From the United States District Court for the District of Columbia

MOTION TO DISMISS OR AFFIRM

Appellee Americans for an Effective Presidency moves the Court to dismiss the appeal herein on the ground that the cause does not present a substantial federal question or, in the alternative, to affirm the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The September 30, 1980 opinion of the three-judge district court, which is not yet officially reported, appears as Appendix A to the Jurisdictional Statement filed by the Federal Election Commission in No. 80-1067.[1]

[1] Citations to this and other materials in the Appendixes to the Federal Election Commission's Jurisdictional Statement are given as "FEC App. _____ at _____."

JURISDICTION

At appellants' request, a three-judge district court was convened pursuant to 26 U.S.C. §9011(b) to "implement or construe" 26 U.S.C. §9012(f), a section of the Federal Election Campaign Fund Act, 26 U.S.C. §9001 *et seq.* On August 28, 1980, the three-judge court granted appellees' motions for summary judgment, and on September 30, 1980, the court issued its opinion holding §9012(f) unconstitutional based on this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Jurisdiction is conferred by 26 U.S.C. §9011(b) and 28 U.S.C §§1252 and 2101.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly . . . .

26 U.S.C. §9012(f) provides:

> (f) Unauthorized expenditures and contributions.
>
> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an

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[2] Both appellees and the Federal Election Commission ("FEC" or "Commission") contested Common Cause's standing and argued that the FEC had primary jurisdiction to hear Common Cause's complaint.

authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to —

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions, or

(B) expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501(a) of this title in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

A. The Statutory Framework.

In 1971, the 92nd Congress sought to regulate campaign financing by enacting two statutes: the Federal Election Campaign Act, 2 U.S.C. §431 *et seq.* ("FECA"), and the Presidential Election Campaign Fund Act, 26 U.S.C. §9001 *et seq.* ("the Fund Act"). This scheme was amended in 1974, when Congress added contribution and expenditure limitations to FECA, added automatic appropriations to the federal election fund and established the amount of the candidates' entitlement. The Federal Election Commission was made responsible for administering the fund. Pub. L. No. 93-443, §§403-405, 88 Stat. 1263 (1974).

Through FECA, as amended, Congress placed limits on the amount of money individuals and groups could contribute to candidates for federal elections and to political committees, and ceilings on the total expenditures permitted in support of such candidates from any source—the candidates themselves, their offical organizations, and other supporters not part of the official campaigns. Specifically, FECA limited expenditures independent of a candidate's campaign to $1,000. This limit applied to all federal campaigns, including presidential campaigns.

The Fund Act was enacted as subtitle H of the Internal Revenue Code and provided for a presidential election campaign fund financed by a taxpayer check-off system. Under this Act, major party candidates who satisfy the Act's eligibility requirements may elect to receive payments from public funds to defray their "qualified campaign expenses," including expenses incurred by the presidential candidate and his running mate or by any of their authorized committees.[3] In order to receive public financing, candidates for President and Vice President must agree that they, and their authorized committees, will be bound by restrictions on contributions and on the amount of qualified campaign expenses they incur, 26 U.S.C. §§9002(4) and 9003, including the requirements that they not incur aggregate expenses in excess of the public payment and not accept private contributions to defray campaign expenses.[4] 26 U.S.C

[3] The term "authorized committee" is defined by the Fund Act to mean any political committee which is authorized in writing by a candidate to further his election. 26 U.S.C. §9002(1).

[4] National party committees affiliated with a candidate, however, may spend an amount equal to two cents times the voting age population of the United States. 2 U.S.C. §441a(d)(2).

§9003(b). The result of the candidate's agreeing to abide by statutory limits on expenditures and by the prohibition on contributions is to forbid all expenditures by individuals and groups in coordination with the candidate's campaign. This result is brought about by the statutory definition of contribution, which includes coordinated expenditures. 2 U.S.C. §441a(a)(7)(B). The right of the candidate to choose to forego coordinated expenditures by supporters and the attendant restriction on the political activities of such supporters was upheld in *Republican Nat'l Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2d Cir.) (en banc) (per curiam), *aff'd summarily*, 445 U.S. 955 (1980).

Section 9012(f) of the Fund Act, 26 U.S.C. §9012(f), the section at issue here, restricts expenditures by political committees that are not "authorized committees" of candidates for President or Vice President. Such committees are prohibited from making "expenditures" in excess of $1,000 "to further the election" of any candidate for President or Vice President who has elected to receive public funding under the Fund Act.

Public financing for presidential campaigns first became available in the 1976 general election. 26 U.S.C. §9013. However, in that year, this Court held, among other things, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that FECA's ceilings on expenditures independent of a candidate's campaign, including presidential campaigns, were unconstitutional. *Id.* at 12-59. Although §9012(f) was not specifically before the Court in *Buckley*, the Court held that independent campaign expenditures are at the very core of protected speech and associational activity and that statutory limits on the amounts which individual citizens or groups can expend on independent

communications in political campaigns are an impermissible restraint on First Amendment freedoms.

B. The Facts Giving Rise to These Cases.

Ronald Reagan, the 1980 Republican presidential candidate, opted for public financing under the Fund Act. The Reagan campaign and its authorized political committees (other than the Republican National Committee) were therefore prohibited from accepting private contributions or from spending more than the amount of the public grant.

Appellees Americans for an Effective Presidency ("AEP"), Americans for Change ("AFC") and Fund for a Conservative Majority ("FCM") are political committees within the meaning of the Fund Act.[5] Each sought to mount a fund raising and advertising campaign in support of the candidacies of Ronald Reagan for President and of various other candidates for public office. None of the appellees is an "authorized committee" of Ronald Reagan, and all operated independently of the Reagan campaign.[6]

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[5] Each of the appellee organizations registered with the FEC as a "political committee," defined by the Fund Act as

> "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. §9002(9).

[6] The FEC has never alleged that appellees' activities were not independent of the Reagan campaign. Common Cause originally alleged in Count II of its Amended Complaint that appellees were not in fact independent of the Reagan campaign, but this count was dismissed by the district court on jurisdictional grounds and for failure to state a claim for relief, as stated in parts V. A and V. B of

The relevant facts before the district court were undisputed. Appellees solicited contributions from individuals who favored Ronald Reagan for President.[7] Appellees' literature and solicitation materials detailed their support for Ronald Reagan and other candidates and outlined their intention to spend the sums collected to publicize their support for such candidates. The money raised was used to engage professional media and political consultants, to purchase advertisements, and generally to publicize their political views before the November election.

C. The Proceedings Below.

On July 1, 1980, Common Cause filed a complaint against AFC and its Chairman and Treasurer. Count I of the complaint alleged that AFC's political activities, even though independent and not associated with the Reagan campaign, violated 26 U.S.C. §9012(f)'s $1,000 ceiling on independent expenditures by political committees. Count II of the complaint alleged that AFC was in fact not independent of the official Reagan campaign and that AFC's receipts and expenditures were therefore contributions to, or expenditures by, the Reagan campaign, thereby violating the Fund Act's restrictions on contributions and expenditures. The complaint sought declaratory and injunctive relief. It requested that a

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the court's opinion. FEC App. A at 28a-32a. Common Cause has not appealed from this dismissal. Common Cause Jurisdictional Statement at 6, n.7. Thus, for the purposes of this appeal, all parties assume *arguendo* that the expenditures of AFC, AEP and FCM were made independently of the official Reagan campaign. *Id.*

[7] Contributions to appellee committees were subject to the $5,000 contribution limitation imposed by §441a of FECA.

three-judge court be convened and that the action be expedited pursuant to 26 U.S.C. §9011(b). Common Cause also moved for immediate discovery against AFC.

On July 15, 1980, the FEC filed an action against AFC, AEP and FCM contending that appellees' independent political activities violated §9012(f)'s restriction on expenditures by political committees in excess of $1,000 and seeking declaratory relief, including a declaration that §9012(f) was constitutional.

On July 17, 1980, Common Cause filed an amended complaint adding appellees AEP and FCM as defendants. It then moved to consolidate the two actions and to intervene as plaintiff in the FEC's action.

Appellees moved for dismissal or, in the alternative, for summary judgment in both actions on the ground, among others, that the restrictions imposed by §9012(f) on independent expenditures by political committees are unconstitutional under this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The appellees and the FEC also sought to dismiss Common Cause's action on the grounds that Common Cause lacked standing to sue to enforce the Fund Act and that the three-judge court was without jurisdiction to hear its claim.

A three-judge district court was convened on July 17, 1980 pursuant to appellants' request for expedited treatment under §9011(b). The court stayed all discovery and set briefing and argument schedules on appellees' motions for dismissal and summary judgment and the jurisdictional issue. On August 28, 1980, the court issued orders granting appellees' motions for summary judgment in the FEC's action and dismissing Count I of Common Cause's action on the basis of the court's disposition of the Commission's case. Count II of Com-

mon Cause's action was dismissed for lack of jurisdiction and failure to state a claim. FEC App. B. Common Cause is not appealing the district court's dismissal of this count.

On September 25, 1980 the district court issued an order consolidating the two cases. FEC App. C. On September 30, 1980, the court issued its opinion, authored by Judge Wilkey. FEC App. A.

D. The Opinion of the Three-Judge Court.

The three-judge district court based its analysis of §9012(f) squarely on this Court's decision in *Buckley* v. *Valeo, supra.*

The court initially concluded that §9012(f) could be interpreted only as a broad prohibition against "*all* expenditures over $1,000 by political committees, including 'independent expenditures.' " FEC App. A. at 7a (emphasis in original).[8]

Utilizing the *Buckley* analysis, the district court carefully weighed the governmental interests allegedly served by §9012(f)'s $1,000 limit on independent expenditures by groups and the resultant impact on political speech and associational activity. It concluded that the proposed spending by appellee committees constituted independent expenditures constitutionally protected under *Buckley*. Consequently, it held §9012(f) facially unconstitutional. *Id.* at 15a-16a.[9]

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[8] Defendants Schmitt, Curtis, and Americans for Change had argued that §9012(f) could be interpreted as prohibiting only coordinated expenditures authorized or requested by a candidate.

[9] Contrary to appellants' assertions, the district court had no need to rest its decision on any facts peculiar to these cases. The so-called "factual" findings to which appellants refer are merely

ARGUMENT

THE CONSTITUTIONAL ISSUES RAISED BY PLAINTIFFS WERE FULLY LITIGATED AND DETERMINED BY THIS COURT IN *BUCKLEY* v. *VALEO* AND SHOULD NOT BE REHEARD AT THIS TIME.

Two propositions were established by this Court in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), and are dispositive of the constitutional issues raised by this appeal. Those propositions are: (1) expenditures for the purpose of furthering the election of a candidate for federal office are political speech protected by the First Amendment; (2) there is no compelling governmental interest justifying the regulation of such expenditures where they are independent of, and not coordinated with, the candidate's campaign. These propositions were recently reaffirmed in *Republican Nat'l Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2nd Cir.)(en banc)(per curiam), *aff'd summarily,* 445 U.S. 955 (1980), which held that limits on expenditures coordinated with the campaign of a publicly financed candidate are permissible only because the candidate's supporters are free to make unlimited independent expenditures. This appeal seeks to relitigate these well settled propositions.

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observations by the court, common to First Amendment analysis, regarding such subjects as the restrictions of the statute, the importance of groups in the political process, and the importance of money for effective political speech. The court's opinion is no more based on factual findings than this Court's decision in *Buckley*, *supra*. *See, e.g.*, the Court's discussion at 424 U.S. 19-20, 47, *quoted infra* at 14-15. Moreover, no factual discussion was necessary because §9012(f) is unconstitutional both on its face and as applied to appellees' proposed expenditures.

A. Independent Political Expenditures Are Protected Speech At The Core Of The First Amendment And At The Heart Of A Free Political Process

In *Buckley, supra,* this Court flatly and unequivocally held that expenditures during a campaign for purposes of political communication are at the core of the First Amendment. The Court stated:

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19.

Because the Fund Act and FECA prohibit all coordinated expenditures by groups or individuals which are not financed by a publicly funded presidential candidate's national campaign committee or by the local party organization, the right of citizens to engage in any effective political communication in presidential campaigns is at stake in this case. Citizens interested in publicizing a viewpoint about the candidates in a presidential campaign cannot do so effectively unless they are free to purchase and use the resources necessary for political communication. If the appellants' view of

§9012(f) is upheld, any group of citizens will be limited to expenditures of under $1,000 unless the national campaign committee provides the money or the resources are within the severely limited class which may be supported by the local party organization and, further, are purchased and made available to the citizens group by that organization.[10] In either case, the right of the group to engage in the particular political communication is conditioned upon receiving the formal sanction of the campaign or party organization. A right to speak which is contingent upon receiving permission from someone else who may forbid or censor the speech is no right at all.

The danger here is not hypothetical. National campaign committees have their own priorities which will by no means emphasize the funding of citizens groups. This was made clear by the court in *Republican Nat'l Committee, supra,* which found that the expenditure limitations associated with public funding had resulted in greatly diminished grass roots activities in presidential elections. 487 F. Supp. 286.

The centrality of the conduct at stake here to a free political process is dramatically underlined by Common Cause's complaint which alleges irreparable injury to the plaintiffs in that the defendants may, unless restrained,

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[10] The term "expenditure" does not include "payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party . . . ." 2 U.S.C. §431(9)(B)(viii). Nor does it include payment by a State or local committee of a political party of "the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President or Vice President . . . ." *Id.* §431(9)(B)(ix).

induce persons to vote for Mr. Reagan. Free societies ought not regard the results of peaceful, political persuasion as a legally cognizable injury.

B. *Buckley* Specifically Held There Is No Compelling Interest Justifying A Limitation On Independent Expenditures

Buckley, supra, rejected both the equalization of campaign resources and the control of escalating campaign spending as governmental interests sufficient to justify limits on campaign expenditures, whether coordinated or independent. This Court stated:

> "The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate . . . .
>
> The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns . . . . [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people — in-

> dividually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign." 424 U.S. at 56-57.

It was also argued in *Buckley, supra*, as it is argued here, that independent expenditures can be limited by statute because, like direct contributions to candidates, they may have, or appear to have, a corruptive influence on the electoral process. In rejecting that argument, this Court noted:

> "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse." 424 U.S. at 47.

Moreover, the Court specifically found that a $1,000 expenditure limitation in federal elections is nothing short of a complete prohibition on speech. Based on the fact — all the more true today — that "television, radio, and other mass media for news and information [are] expensive modes of communication [and] indispensible instruments of effective political speech," the Court held that a $1,000 expenditure ceiling

> "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communciation." 424 U.S. at 19-20.

In a footnote to this passage, the Court underlined this conclusion by noting that "as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04 . . . ." *Id.*, n. 20.

Accordingly, the Court held that independent expenditure ceilings "heavily burden core First Amendment expression . . ." and that they are not justified by any compelling governmental interest. The Court concluded:

> "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. at 48.

Neither the Common Cause plaintiffs nor the Commission has offered a governmental interest of substance which was not argued and rejected in *Buckley, supra.* If anything, the interests argued in *Buckley* were stronger, for the statutory provision at issue there, former §608(e)(1) of the FECA, prohibited independent expenditures in excess of $1,000 by individuals as well as political committees. Section 9012(f), on the other hand, imposes no limit on independent expenditures by individuals. As a consequence, §9012(f) leaves wealthy individuals free to make unlimited independent expenditures. In contrast, organizations seeking to facilitate the pooling of resources by small donors are severely restricted. This relative enhancement of political communication by the wealthy is inconsistent with appellants' own theories of the purposes served by this statute. *See* FEC Jurisdictional Statement at 9-10.

Finally, appellants seek to justify this draconian restriction on political communication by wrapping it in the mantle of public financing. But a limitation on independent expenditures is neither an indispensable nor

even an appropriate adjunct to the public financing provisions. To the contrary, the freedom to make unlimited independent expenditures is essential to the constitutionality of that statutory scheme.

At issue in *Republican Nat'l Committee, supra*, was the constitutionality of public financing and its accompanying prohibition on coordinated expenditures by individuals or groups, no matter how small. The court there explicitly stated:

> "We similarly conclude that the limitations [on coordinated expenditures by groups or individuals] do not abridge the rights of supporters. The plaintiffs have shown that the effect of the public funding alternative is to decrease the importance of 'grass roots' political activity compared to privately financed campaigns. Private individuals are unable to make expenditures coordinated with the campaign organizations, such as renting vans to distribute literature, paying the cost of photocopying and distributing campaign materials received from the candidate's organization . . . . On the other hand, supporters are left with a wide range of ways to express their support . . . . *Most important, uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in Buckley* v. *Valeo* . . . ." 487 F. Supp. at 286 (emphasis added).

The constitutionality of the public financing scheme thus rests squarely on the right to make unlimited independent expenditures. The power of the candidate to choose to prevent activities by supporters extends only to expenditures coordinated with the candidate's campaign.[11]

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[11] As the court noted:

> ". . . [I]t would be unreasonable to preclude a candidate who prefers public financing from using it instead of private financ-

C. Section 9012(f) Is *A Fortiori* Unconstitutional

The limitation on independent expenditures before this Court in *Buckley, supra*, former §608(e)(1), read:

> "No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000."

Compared to §9012(f), that provision is a paradigm of a carefully drafted statute, tailored to a discernible congressional purpose. Whereas §608(e)(1) was limited to expenditures for speech explicitly advocating or attacking an identified candidate, §9012(f) merely requires that it "further" the election of a candidate and fall within the definition of "qualified campaign expense." If §9012(f) reaches independent expenditures, it must impact on issue discussion as well as explicit candidate advocacy. In the recent election, for example, Mr. Carter strongly supported the SALT II agreement while Mr. Reagan opposed it. A group of individuals sharing the cost of a full page newspaper advertisement in late October extolling the virtures of SALT II would fall within §9012(f)'s proscriptions. Political activists who purchased such ads could hardly claim indifference to the outcome of the presidential election or deny that the ad might "further" Mr. Carter's chances. That the candidates were not mentioned is irrelevant, since the expenditure would have

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ing merely because some supporters believe that the decision deprives them of the ability to contribute to the candidate's election in the precise way they would if the campaign were privately financed." 487 F. Supp. 280 at 286.

been a "qualified campaign expense" if made by the Carter campaign itself.

The broad proscription of §9012(f), if upheld, will chill other kinds of political activities. For example, in the recent election, groups opposing the candidacy of Congressman Anderson might reasonably fear that independent expenditures opposing his election would be viewed as "furthering" the election of Mr. Carter. Indeed, as appellant Long acknowledges in her allegations, this lawsuit itself was intended to prevent people from being persuaded to vote for Mr. Reagan; consequently, this lawsuit was intended to "further" Mr. Carter's candidacy.[12]

In contrast to former §608(e)(1) of FECA, therefore, §9012(f) is not limited to explicit candidate advocacy but prohibits a wide variety of political activities, including those of issue groups. If the narrow provisions of §608(e)(1) cannot survive constitutional scrutiny, the virtually unlimited proscriptions of §9012(f) are an *a fortiori* case of unconstitutional overbreadth.[13]

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[12] The potential of §9012(f) to chill effective political speech is further illustrated in this case by the fact that the Carter/Mondale Presidential Committee, Inc. sent a letter to hundreds of broadcasters the day after Common Cause filed its Amended Complaint advising them of the Common Cause lawsuit and of the FEC's action. The letter cautioned the broadcasters that purchasing of broadcasting time by appellee committees raised "serious legal questions." The letter threatened litigation before "courts and federal agencies" if the stations allowed appellees to purchase advertising time.

This letter was an exhibit before the three-judge court and is included as Appendix A to this Motion.

[13] Contrary to the assertion of the Common Cause appellants, discovery into the structure and operation of the appellees would add nothing relevant. If §9012(f) reaches independent expenditures,

The only limiting language in §9012(f), the restriction to "political committees," does not reduce its constitutional vulnerability. First, *Buckley, supra*, specifically held that the First Amendment protected independent expenditures by persons both individually and collectively in groups, associations, or political committees. 424 U.S. at 39, 40, 57. Indeed, a fundamental reason for invalidating §608(e)(1) was that

> "the Act's $1,000 limitation on independent expenditures 'relative to a clearly identified candidate' *precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association*. 424 U.S. at 22 (emphasis added).

Second, §9012(f) strengthens the political hand of individuals wealthy enough to bear the costs of effective political communication and disadvantages the less wealthy, whose only effective political expression lies in collective efforts. While a person with $20,000 to purchase a television advertisement is perfectly free to do so, someone who wants to contribute $10 to a committee for the purpose of placing the same advertisement is effectively stopped by §9012(f), which prohibits the ad. This is, as the district court found, without constitutional foundation. *See Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); *Police Department* v. *Mosley*, 408 U.S. 92 (1972).[14]

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it does so as to "any" political committee, not just those selected by Common Cause as defendants. Whether its limit on such expenditures is *facially* constitutional, therefore, does not depend in any way on the nature of these particular defendants.

[14] The exclusion of expenditures by broadcasters, publications, and "501(c)" organizations is also a constitutionally vulnerable distinction, as the three-judge court noted. FEC App. A at 25a, n. 43.

Appellants are well aware that §9012(f)'s pervasive proscriptions on political speech and associational activity render it constitutionally vulnerable. Their briefs thus seek to limit its impact to groups which are professionally assisted and receive contributions and to exclude "informal groups." This interpretation is not based on statutory language, legislative history, administrative ruling, commission regulation, judicial precedent or on any other criterion utilized by lawyers. It is cut from whole cloth, to be used in this case only.

If §9012(f) prohibits independent expenditures, it applies to *all* groups which make the proscribed expenditures, whether those involved know each other personally, whether they be managed by the most skillful political operative or the most disoriented activist, whether they raise their funds by direct mail or by personal appeal over a backyard fence. There is no such category as "informal group" in election law. Any "informal group" would fall within the term "any committee, association, or organization . . . ." 26 U.S.C. §9002(9). Indeed, the concept of "informal group" espoused by appellants would make a shambles of the major provisions of FECA, for such groups would escape the limit on the size of contributions made to "political committees." 2 U.S.C. §441a(a)(2)(C).

CONCLUSION

Appellee Americans for an Effective Presidency respectfully submits that the questions presented by appellants' Jurisdictional Statements are not substantial federal questions and therefore moves the Court to dismiss the appeals, or, in the alternative, to affirm the judgment entered by the United States District Court for the District of Columbia.

Respectfully submitted,

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January 26, 1981

APPENDIX

CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC.
1413 K Street, N.W., Washington, D.C. 20005
(202) 789-7200

July 18, 1980

ROBERT S. STRAUSS, CHAIRMAN
TIM KRAFT, NATIONAL CAMPAIGN MANAGER
S. LEE KLING, TREASURER
EVAN S. DOBELLE, NATIONAL FINANCE CHAIRMAN

Dear Broadcaster:

It has come to the attention of the Carter/Mondale Reelection Committee, Inc. that allegedly "independent" supporters of Ronald Regan's campaign plan massive purchases of broadcasting time to air highly controversial spots, containing attacks on either the President, other leading Democrats, or the Democratic Party generally. The Wall Street Journal, for example, reported on June 19, 1980, page 1, that groups identified as "Americans for Change," "Citizens for Reagan in '80," "Americans for Reagan," and "The Ronald Reagan Victory Fund" are among those which intend to spend over $50 million to try to influence the outcome of the November election. (See also the attached New York Times editorial and a recent Associated Press article on the commericals [sic] apparently already being distributed by one of the groups.)*

The Carter/Mondale Reelection Committee, Inc., the official and authorized campaign committee for President Carter, and the Democratic National Committee have filed a complaint with the Federal Election Commission against these so-called "independent groups", the Reagan for President Committee, and others alleging that the Federal Election Campaign Act will be violated if the Republican nominees receive public funding of their campaign while at the same time receiving massive support from alleged "independent" backers.

In addition, a lawsuit was recently filed by Common Cause against one of these groups challenging its independent status and charging that the proposed expenditures in support

* Attachments to the letter have not been reproduced in this Appendix.

of Reagan's candidacy will seriously distort and undermine the plan for public financing of Presidential election campaigns enacted by Congress in 1974. Finally, the Federal Election Commission this week has filed its own action seeking a judicial ruling that would have the effect of prohibiting these groups from making their planned multi-million dollar expenditures while the Reagan campaign is also accepting more than $29 million in taxpayer funds. These cases are pending in the Federal District Court in Washington, D.C. We are confident that these proceedings will establish that such groups are not permitted under the law to make such expenditures on behalf of a presidential candidate who also is receiving public financing. Further, we believe that it will be determined that the particular committees in question and their organizers are not, and cannot be, truly independent of the Reagan campaign.

However, in either event, the purchase of broadcasting time by the so-called "independent" groups under such circumstances raises serious legal questions which you should consider.

Even if some or all of these groups are deemed legally capable of making independent expenditures for Reagan as a matter of federal election law:

*They are not entitled to the reasonable access provision of Section 312(a)(7) of the Communications Act.

*The broadcast of programs dealing with controversial issues of public importance paid for by such "independent" groups may obligate you, under the FCC's Fairness Doctrine to provide time without charge for the broadcast of opposing viewpoints.

*Any such program which constitutes a personal attack will obligate you, under the FCC rules, to notify the person or persons attacked and to offer them a free opportunity to respond.

*To the extent any such program involves a "political use" by a qualified candidate within the meaning of Section 315(a) of the Communications Act, you will be required to offer equal time to all other legally qualified

candidates, and, to the extent that the political use was without cost to the candidate whose candidacy was promoted in the broadcast, you would be required to offer free time to all other legally qualified candidates. See Letter to Hon. Mike Monroney, 40 F.C.C. 251 (1952).

If, as claimed in the actions mentioned above, the groups in question are found to be acting in concert with the Reagan for President Committee or otherwise ineligible for the making of "independent expenditures," then:

*The purchase by them of broadcast time may involve serious violations of law that could potentially involve a participating station in litigation before courts and federal agencies.

*The purchase of time by such groups would obligate a station to provide equal opportunities to all opposing candidates and their affiliated supporters.

As is apparent from this letter, we believe that expenditures, by allegedly independent backers of one candidate, of massive funds for the purchase of broadcast time to influence the result of the Presidential Election in favor of that candidate is a direct threat to the delicately balanced system of campaign spending limitations and public financing mandated by Congress for the conduct of Presidential elections.

We hope you will give careful consideration to the problems inherent in use of the broadcast media for these purposes and, if you have any questions, we urge you to consult with your counsel before accepting requests for the purchase of political broadcast time by any group which is not the official, authorized committee of a qualified candidate.

Sincerely,

/s/ TIMOTHY G. SMITH
Timothy G. Smith
General Counsel

cc: Federal Communications Commission

Attachments

TGS:jm